Supreme Court, U.S.
FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-738

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THOMAS CHAMBERS,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CAMPBELL COUNTY CIRCUIT COURT, 17TH JUDICIAL DISTRICT OF THE COMMONWEALTH OF KENTUCKY

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QUESTIONS PRESENTED FOR REVIEW

I.

IS IT A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL FOR THE RESPONDENT TO ENTER INTO THE EVIDENCE THE CONVICTION OF AN EMPLOYEE OF THE PETITIONER FOR THE OFFENSE OF PROSTITUTION TO BE USED AGAINST THE PETITIONER TO PROVE THE OFFENSE OF PERMITTING PROSTITUTION WHEN THE CONVICTION OF THE EMPLOYEE WAS NOT FINAL BECAUSE THE EMPLOYEE HAD TIMELY FILED A MOTION TO RECONSIDER HER CONVICTION ON APPEAL?

II.

IS IT A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL FOR THE RESPONDENT TO ENTER INTO THE EVIDENCE THE PRIOR CONVICTION OF THE PETITIONER FOR PERMITTING PROSTITUTION AT ANOTHER BAR WHICH OCCURRED OVER TWO YEARS PRIOR TO THE CHARGES BEING BROUGHT AGAINST THE PETITIONER IN THE CASE AT BAR FOR THE PURPOSES OF SHOWING LACK OF MISTAKE OR COMMON PLAN OR SCHEME?

III.

IS IT A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL FOR THE RESPONDENT TO ENTER INTO THE EVIDENCE THE CONVICTIONS OF PRIOR OWNERS AND EMPLOYEES OF THE BAR WHO HAD NO CONNECTION WITH THE PETITIONER AND WHEN ALL CONVICTIONS WERE PRIOR TO THE OWNERSHIP OF THE BAR BY THE PETITIONER WHICH CONVICTIONS WERE OFFERED BY THE RESPONDENT TO SHOW KNOWLEDGE OF PROSTITUTION OR REASONABLE CAUSE TO HAVE KNOWLEDGE OF PROSTITUTION ON BEHALF OF THE PETITIONER?

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vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CAMPBELL COUNTY CIRCUIT COURT, 17TH JUDICIAL DISTRICT OF THE COMMONWEALTH OF KENTUCKY

The petitioner, Thomas Chambers, by and through counsel, prays that a Writ of Certiorari issue to review the judgment of the Campbell Circuit Court entered in this case on April 2, 1985.

OPINIONS BELOW

No written opinions regarding the issues in this case were filed or published by the Campbell District Court and no written transcript has been prepared from the oral recordings of the proceedings. The written Judgment of the Campbell Circuit Court is at Pages 2a-6a of the Appendix and has not been officially reported.

JURISDICTIONAL STATEMENT

The Judgment of the Campbell Circuit Court, 17th Judicial District of the Commonwelath of Kentucky, was

entered on April 2, 1985 (App. B, page 2a). The Court of Appeals of Kentucky denied discretionary review on June 3, 1985 (App. C, page 7a). The Supreme Court of Kentucky denied discretionary review on August 28, 1985 (App. D, page 8a).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

AMENDMENT 6, CONSTITUTION OF THE UNITED STATES:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The petitioner was charged with the offense of permitting prostitution in violation of KRS 529.070, a misdemeanor. As the result of an undercover police investigation, an employee of the bar, which bar was in the possession or control of the petitioner at the time of the alleged acts, was charged with two counts of prostitution and the employee was subsequently convicted of both counts. She appealed her conviction of the two counts of prostitution and the Campbell Circuit Court entered a judgment affirming her conviction approximately four days prior to the trial of the petitioner for the offense of permitting prostitution. The charge of permitting prostitution against the defendant was a result of the employee being convicted of the two counts of prostitution at his bar. Prior to the

trial of the petitioner, the employee timely filed a motion to reconsider the judgment of the Campbell Circuit Court concerning her prostitution appeal. This motion was still pending at the time of petitioner's trial, therefore, her judgment in the Campbell Circuit Court was not final. However, the trial court permitted the nonfinal conviction of the employee of the petitioner to be introduced into the evidence over the objection of the petitioner.

During the course of the trial, which was held before the trial court without the intervention of a jury, testimony revealed that the petitioner had been previously convicted of permitting prostitution at another bar which he owned prior to purchasing the present bar. Since the petitioner had pleaded guilty to the prior charge of permitting prostitution at one of his other three bars, he had no employee convicted of any prostitution charge until the employee at the present bar. When the petitioner purchased the present bar, he terminated the employment of all employees at the bar except for one person who had never been charged with any criminal offense. The one employee who was charged with the two counts of prostitution and subsequently found guilty and whose conviction was still not final, was hired by the petitioner after he took control of the present bar. Her employment, incidentally, was terminated after her conviction in the Campbell District Court.

Evidence was also introduced in the trial of the petitioner, over his objections, of the convictions of the prior owners of the bar and their employees for prostitution related offenses at the bar which were prior to the petitioner taking over the possession and control of the bar. Petitioner had no association with those individuals.

The trial judge found the petitioner guilty of permitting prostitution and imposed the maximum sentence upon him of ninety days in jail and a fine of $250. Judgment was entered on December 3, 1984 (App. A, page 1a).

The conviction was appealed to the Campbell Circuit

Court and on April 2, 1985 the Campbell Circuit Court affirmed the decision of the trial court (App. B, page 2a).

On June 3, 1985 the Kentucky Court of Appeals denied discretionary review (App. C, page 7a). On August 28, 1985, the Kentucky Supreme Court denied discretionary review (App. D, page 8a).

REASONS TO ALLOW WRIT OF CERTIORARI

I.

IT WAS A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL FOR THE RESPONDENT TO ENTER INTO THE EVIDENCE THE CONVICTION OF AN EMPLOYEE OF THE PETITIONER FOR THE OFFENSE OF PROSTITUTION TO BE USED AGAINST THE PETITIONER TO PROVE THE OFFENSE OF PERMITTING PROSTITUTION WHEN THE CONVICTION OF THE EMPLOYEE WAS NOT FINAL BECAUSE THE EMPLOYEE HAD TIMELY FILED A MOTION TO RECONSIDER HER CONVICTION ON APPEAL.

The Court should grant certiorari because the Campbell Circuit violated the Sixth Amendment right of the petitioner to a fair trial when it permitted the respondent to enter into the evidence, over the objection of the petitioner, the conviction of an employee of the petitioner for the offense of prostitution at his bar. The employee had appealed her conviction and prior to the trial of the petitioner, after receiving the judgment affirming her conviction, she moved the appellate court to reconsider her judgment. Thus, her conviction was not final and should not have been introduced into the evidence.

In *Ross* v. *Commonwealth*, Ky.App., 577 S.W.2d 6, 14 (1978), the Kentucky Court of Appeals discussed the use of a prior conviction which was on appeal and a mandate had not been issued:

> If Mrs. Moore's prior felony conviction was on appeal and the mandate had not issued, it would be improper to use that conviction for purposes of impeachment. . . .

The Court further stated at page 15 as follows:

> [L]ikewise, if the trial court determines that Mrs. Moore's prior felony conviction would not be relevant under the Cotton rule, or that Mrs. Moore's conviction had been appealed and the mandate had not issued, then the trial court shall grant Spencer a new trial; . . .

Likewise, RCr 12.04(4) of the Kentucky Rules of Criminal Procedure provides that the filing of a notice of appeal shall stay proceedings on the judgment as long as the case remains on appeal, except for the requirement of bail.

The Supreme Court of Kentucky in *Adkins* v. *Commonwealth*, Ky., 309 S.W.2d 165 (1958), held at 166:

> It is prejudicial error to require a witness to testify that he has been convicted of a felony, pending an appeal of the conviction. . . .

The petitioner has been denied a fair trial as guaranteed by the Sixth Amendment to the United States Constitution due to the introduction of the conviction of the employee of the petitioner which was not final. The Sixth Amendment provision has been held applicable to the states through the due process clause of the Fourteenth Amendment in *Pointer* v. *Texas*, 380 U.S. 400 (1965).

II.

IT WAS A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL FOR THE RESPONDENT TO ENTER INTO THE EVIDENCE THE CONVICTION OF THE PETITIONER FOR PERMITTING PROSTITUTION AT ANOTHER BAR WHICH OCCURRED OVER TWO YEARS PRIOR TO THE CHARGES BEING BROUGHT AGAINST THE PETITIONER IN THE CASE AT BAR FOR THE PURPOSES OF SHOWING LACK OF MISTAKE OR COMMON PLAN OR SCHEME.

The petitioner pleaded guilty to permitting prostitution at a bar he owned two years prior to the case at bar. The former charge did not involve the bar in which the petitioner is now charged with permitting prostitution. The respondent used the former conviction to show lack of mistake or common plan or scheme for the alleged violation of law at the present bar. Subsequent to his prior conviction, the petitioner took precautionary measures and steps to prevent any form of prostitution at any of his business establishments, including the present bar. This included firing all former employees of his present bar when he took possession of same, except for one employee that he kept on because she had no prior criminal record.

The respondent again violated the Sixth Amendment right of the petitioner to a fair trial by the introduction into the evidence of the prior conviction, over the objection of the petitioner. The introduction of the prior conviction violated the general and well accepted and established rule in criminal cases in Kentucky that evidence which in any manner shows or tends to show that a defendant had committed another offense independent of that for which he is being tried is inadmissible. *Russell* v. *Commonwealth*, Ky., 482 S.W.2d 584 (1972); *Keith* v. *Commonwealth*, Ky., 251 S.W.2d 850 (1952).

From the factual situation of this case, the prejudicial ef-

fect of the introduction of the prior conviction which was two years prior to the present charge out-weighed the probative worth and the petitioner was denied a fair trial. The Kentucky Supreme Court in *Wonn* v. *Commonwealth*, Ky., 606 S.W.2d 169, 171 (1980), stated:

> Against the probative value to be served through admitting such testimony is weighed the potential of undue prejudice which could be vented through the tendency to overpersuade or prejudice thereby denying the opportunity for a fair trial. Prejudice is measured by the purpose to be served with the evidence as well as by a consideration of the nature of the testimony itself.

Under the facts of this case, as well as the applicable law, the petitioner was denied a fair trial by the introduction of the prior permitting prostitution conviction.

III.

IT WAS A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL FOR THE RESPONDENT TO ENTER INTO THE EVIDENCE THE CONVICTIONS OF THE PRIOR OWNERS AND PRIOR EMPLOYEES OF THE BAR WHO HAD NO CONNECTION WITH THE PETITIONER AND WHEN ALL OF THE CONVICTIONS WERE PRIOR TO THE OWNERSHIP OF THE BAR BY THE PETITIONER WHICH CONVICTIONS WERE OFFERED BY THE RESPONDENT TO SHOW KNOWLEDGE OF PROSTITUTION OR REASONABLE CAUSE TO HAVE KNOWLEDGE OF PROSTITUTION ON BEHALF OF THE PETITIONER.

When the prior owners and employees of the bar were convicted of prostitution activities, the petitioner had no connection with the bar or its employees. However, petitioner testified that he had been informed that there had been pros-

titution activity at the bar prior to petitioner taking ownership and possession of the bar. Yet, petitioner fired all employees of the previous owners except for one employee who had no criminal record. Only one person was charged with prostitution at the bar once the petitioner took possession of same from the prior owners. She was terminated from her employment and her case on appeal was not final at the time of the trial of the petitioner. Clearly, the use of the non-final conviction of the employee of the petitioner violated the petitioner's right to a fair and impartial trial. Although the Supreme Court of the United States does not sit as a court of criminal appeals to review state cases, especially in procedures involving rules of evidence, the Supreme Court of the United States will hear state cases that involve rules of evidence that infringe on a guarantee in the Federal Constitution. *Burgett* v. *Texas*, 389 U.S. 109 (1967). This is such a case since the Sixth Amendment to the United States Constitution has been violated not once, but three times.

CONCLUSION

The decision of the Campbell Circuit Court concerning the judgment against the petitioner should be reversed for the reasons set forth in the arguments contained herein.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

Exhibit A

CALENDAR

Date December 3, 1984

Time 9:00 A.M.

Court Judge Lambert Hehl

Case No.: 84-M-1750
Style: Thomas Chambers
Charges or Claim: 529.070 Permitting Prostitution
Proceedings: Found Guilty — Sent. to $250 + 90 Days + Court Costs
Stay For 10 Days to Appeal Otherwise Surr. to Jailer 6 P.M. 12/14

Judge Signature: /s/ LAMBERT HEHL
Date: 12/3/84

Exhibit B

CAMPBELL CIRCUIT COURT
DIVISION NO. ONE

NO. 84-X-48

COMMONWEALTH OF KENTUCKY,
Plaintiff/Appellee,

vs.

THOMAS CHAMBERS,
Defendant/Appellant.

JUDGMENT
(Entered April 2, 1985)

Thomas Chambers appeals from a Judgment of the Campbell District Court convicting him of the offense of Permitting Prostitution, in violation of K.R.S. 529.070, "a person is guilty of permitting prostitution when, having possession or control of premises which he knows or has reasonable cause to know are being used for prostitution purposes, he fails to make reasonable and timely efforts to halt or abate such use." The case was tried before the Court without a jury.

As grounds for appeal, the appellant presents three arguments. First, (and to an extent also encompassed in his third argument) is the contention that the trial court committed error when it permitted the introduction of evidence of conviction of Karen Hadden, an employee of the appellant, for prostitution while said conviction was on appeal. This argument is without merit for two compelling reasons. First, the conviction of the employee, Hadden, was affirmed prior to the trial of the appellant herein. Secondly, even without the record of conviction, there was sufficient direct evidence at the trial of Chambers to establish this violation.

The second grounds for appeal asserted by the appellant is

that the trial court permitted error in permitting the Commonwealth to introduce evidence of prior convictions of Chambers for permitting prostitution for the purpose of showing lack of mistake or common plan or scheme. The appellant acknowledges that under the authority of *Edwards* v. *Commonwealth*, Ky. 489 SW 2d 23 (1973), evidence of other crimes can be admitted in order to show intent, motive, guilty knowledge, plan or scheme, or is inextricably interwoven with the commission of the principal offense. The appellant cites *Wonn* v. *Commonwealth*, Ky. 606 SW 2d 1969 (1980) as holding that the probative value to be served through admitting such testimony must be weighed against the potential of undue prejudice which could be vented through the tendency to overpersuade or prejudice, thereby denying the opportunity for a fair trial. The appellant cites this case, and apparently feels that nothing further need be said, since the argument is pursued little further. We feel constrained, however, to examine this situation at greater length.

The admissibility of evidence of other crimes is a question which has plagued the courts over many years. The opinion of Justice Palmore in *Jones* v. *Commonwealth*, Ky. 554 SW 2d 363 (1977) contains an illuminating dissertation of this question which should perhaps be required reading for all trial attorneys and judges. As pointed out there,

> "The general proposition that evidence of other crimes is not admissible is somewhat akin to the rule against hearsay evidence, in that each is said to have a good many 'exceptions' ".

Evidence of criminal conduct not connected with the charge being tried is character evidence, which would be admissible under European continental law, but is generally excluded under the English Common Law. Such evidence, while inadmissible as showing bad character may well be admissible for other purposes.

> "The question thus in effect becmes: is the criminality of conduct a reason for excluding that conduct (when of-

> fered against an accused person) if it would be otherwise relevant and admissible?"

Justice Palmore cites *Wigmore* in discussing the inherent difficulty in distinguishing between conduct as showing character and conduct as showing other things and the failure to appreciate that the rejection of past conduct by the character-rule is never due simply to the incidental circumstance that it is misconduct, but to the fact that it is offered to show character and that herein consists its impropriety.

> "If there is any other material or evidential proposition, for which it is relevant, and it is offered for that purpose, it is receivable, and its quality as misconduct or crime does not stand in the way."

Again quoting Justice Palmore:

> "That evidence otherwise admissible is not made inadmissible merely because it shows an unrelated crime has been the established rule in this state from time immemorial."

With this background, it becomes clear that the evidence of the prior conviction of the defendant was only part of the overall picture which went to prove the second element of the offense, namely that the defendant knew or had reasonable cause to know that the premises were being use for prostitution purposes. Much of this was established through the defendant's own testimony in the case of *Commonwealth of Kentucky ex rel Twehues* v. *Thomas Chambers*, Campbell Circuit Court, NO. 84-CI-806. A transcript of that testimony is before the Court and is referred to herein by page number. The parts of the mosiac which, together with the conviction of the defendant in the prior crime, include the following: (a) he knew of prior prostitution activity at the Mousetrap (page 8); (b) he had a proprietary nterest in the Body Shop, Dillinger's, and the Kit Kat Club (page 14), all of which had prostitution activities while he had an interest (this was

denied by him as to Dillinger's); (c) he was aware of prostitution activity in the other establishments, (page 14); (d) he was aware of many prostitution activities at the Body Shop while he had an interest in that establishment (page 15); (e) it was common practice for bars associated with prostitution to take one-half of the price charged for drinks and collected by the girls involved (page 9); (f) he took over the Mouse Trap about March (page 10) and Karen Hadden had two prostitution incidents and both resulted in convictions. These incidents occurred between June 13th and June 22nd (page 10); (g) the testimony of the police officers was that the operation at the Mouse Trap fit the same pattern as the other places operated by the defendant as to price, lighting, location of activities, etc.; (h) the defendant entered a plea of guilty in 1982 at the Body Shop, where there were at least three convictions for prostitution in 1981.

It is clear that a conviction of another crime may be used to show, by similar acts or incidents, that the offense for which the defendant is now being tried was not accidental, unintentional or without guilty knowledge.

> "Where evidence is susceptible of interpretation that the acts alleged to constitute a crime were innocently performed, and the vital issues of knowledge and intent are keenly disputed, it is well within the trial judge's discretion to permit the Government, on a properly limited basis, to introduce evidence of prior similar offenses demonstrating the unlikelihood that the defendant was a mere innocent, unknowing bystander." *United States* v. *Klein*, Second Circuit 1965, 340 Fed. 2d 547.

Even without the prior conviction of the defendant, there was ample evidence to allow the trier of fact to find that the requirement of the statute had been met.

The appellant likewise complains of the introduction of prior convictions at the Mouse Trap at a time when the appellant was not the owner thereof. Again, the answer to this is contained in the discussion immediately preceding.

Reverting to the elements necessary to constitute the offense of permitting prostitution, in addition to knowledge on the part of the defendant, two other things are necessary.

(a) The accused must have possession or control of the premises. There is little doubt regarding this, since ownership was clearly established and, in fact, admitted by the defendant.

(b) Failure to make reasonable and timely effort to halt or abate such use.

Defendant urges he did all in his power to have halted or abated the use of the premises for prostitution purposes. He claims to have fired Hadden as soon as it was brought to his attention that she had engaged in prostitution. The evidence shows that such prostitution activities, on the part of Karen Hadden, continued at least for the period from June 13th to June 22nd. Although he claims to have discharged Karen Hadden, she herself testified that she was not fired but quit at some point and, in addition, the records of the City of Newport show that she was employed there during much of the third quarter of the year. The defendant makes vague claims to have had electrical work performed in an effort to reduce prostitution. He likewise claims to have relied on Officer Strange for advice on how to keep from being in violation. This is denied by the officer involved and, on its face, is unreasonable to believe.

The Judgment of the lower court is affirmed.

/s/ G. A. MUEHLENKAMP

I, Jean V. Grim, Clerk of the Campbell Circuit Court, hereby certify that a true and correct copy of the foregoing was mailed this 2nd day of April, 1985, to Hon. Michael Schulkens, Hon. Paul Twehues and Judge Lambert Hehl.

Jean V. Grim, Clerk

by: JEAN V. GRIM, Clerk

Exhibit C

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 85-CA-1247-D

TOM CHAMBERS,

Movant,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON MOTION FOR DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: HAYES, CHIEF JUDGE, GUDGEL, and HOWERTON, JUDGES.

This Court, having considered the motion for discretionary review and the response thereto, and being otherwise sufficiently advised, ORDERS that it be, and it is hereby, DENIED.

ENTERED: June 3, 1985

/s/ J. W. HOWERTON
Judge, Court of Appeals

Exhibit D

SUPREME COURT OF KENTUCKY

85-SC-542-D
(85-CA-1247-D)

TOM CHAMBERS,

Movant,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

CAMPBELL CIRCUIT COURT
84-M-1750

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movant for a review of the decision of the Court of Appeals is denied.

ENTERED August 28, 1985.

/s/ ROBERT F. STEPHENS
Chief Justice

Exhibit E

KENTUCKY PENAL CODE

529.070 Permitting prostitution

(1) A person is guilty of permitting prostitution when, having possession or control of premises which he knows or has reasonable cause to know are being used for prostitution purposes, he fails to make reasonable and timely effort to halt or abate such use.

(2) Permitting prostitution is a Class B misdemeanor.

HISTORY: 1974 H 232, § 256, eff. 1-1-75.